IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 12 CR 723
	)	Judge Sharon Johnson Coleman
ADEL DAOUD,	)	
	)	
Defendant.	)	

MOTION FOR DISCOVERY IN SUPPORT OF DEFENDANT'S PREVIOUSLY FILED MOTION FOR NOTICE OF FISA AMENDMENTS ACT EVIDENCE PURSUANT TO 50 U.S.C. §§ 1881e(a), 1806(c) (Dkt. #42)

Defendant, **ADEL DAOUD**, by and through his attorneys, **THOMAS ANTHONY DURKIN**, **JANIS D. ROBERTS**, and **JOSHUA G. HERMAN**, pursuant to 50 U.S.C. §§ 1881e(a) and 1806(c), Rule 16(a)(1)(E)(i) & (ii), the Search and Seizure, Due Process, and Effective Assistance of Counsel provisions of the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States, as well as the principles enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963), respectfully moves this Court to order the government to disclose any and all information supplied by Executive Branch law enforcement or intelligence agencies to the United States Senate Select Committee on Intelligence ("SSCI") regarding the use or results of any and all electronic surveillance, eavesdropping, recording, storage, or other means of gathering or collecting Defendant's oral, written, or electronic communications.

In support of this motion, Defendant, through counsel, shows to the Court the following:

1. On May 22, 2013, counsel filed a pleading captioned, "Defendant's Motion for Notice of FISA Amendments Act Evidence Pursuant to 50 U.S.C. §§ 1881e(a), 1806(c)." (Dkt. #42). The motion requested that the government provide notice of: "(1) whether the electronic surveillance described in its FISA Notice was conducted pursuant to the pre-2008 provisions of

the Foreign Intelligence Surveillance Act ("FISA") or, instead, the FISA Amendments Act ("FAA"); and, (2) whether the affidavit and other evidence offered in support of any FISA order relied on information obtained or derived from an FAA surveillance order." The motion was premised in part on Senate floor comments by Senator Diane Feinstein (D-CA) on December 27, 2012, which specifically referenced this case and suggested that the FAA was instrumental in foiling the alleged terrorist plot. (Dkt. #42, ¶4).

2. In its August 8, 2013, Sur-Reply to Defendant's Motion, the prosecutors acknowledged that they would have to provide notice to the defense and the Court if, as they wrote, they "intended to use in this case any information obtained or derived from surveillance authorized under [the FAA] as to which the defendant is an aggrieved person." (Dkt. #49, pp. 1-2). The prosecutors further asserted that no notice was provided in this case because the government "does not intend to use any such evidence obtained or derived from FAA-authorized surveillance in the course of this prosecution." (*Id*., p. 2).

3. In light of the obvious tension between Senator Feinstein's public comments regarding the use of the FAA and the prosecutors' position in their pleading that no notice of the use of the FAA was required, undersigned counsel wrote a letter to Eric Losick and Jack Livingston, Counsel for the SSCI, Majority and Minority, respectively, on August 20, 2013, and requested "any and all 'assessments, reports, and other information obtained by the Intelligence Committee' to which Senator Feinstein referred in sharing her comments with the Senate, insofar as these documents pertain to the implementation of the FAA surveillance with respect to Mr. Daoud's case." A copy of this letter is attached hereto as Exhibit A.

4. On September 16, 2013, Morgan J. Frankel, Counsel for the Office of Senate Legal Counsel, responded on behalf of the SSCI to counsel's letter. A copy of Senate Legal

Counsel's letter is attached hereto as Exhibit B. In this letter, Senate Legal Counsel declines to comply with counsel's request for production based primarily on the invocation of the legislative privilege under the Speech or Debate Clause, Article I, section 6, clause 1, of the United States Constitution.[1]

5. After invoking this legislative privilege, Senate Legal Counsel proceeds to state, nevertheless, that: "[w]ithout waiving Senator Feinstein's or the Intelligence Committee's legislative privilege, [he] would like to provide some clarification that may help explain a misunderstanding of the Chairman's remarks on which your documentary request is predicated." (Ex. B, p. 2) Senate Legal Counsel then goes on to relate—curiously one might add—that "*[n]otwithstanding that she was speaking in support of reauthorization of Title VII of the Foreign Intelligence Surveillance Act, Senator Feinstein did not state, and did not mean to state, that FAA surveillance was used in any or all of the nine cases she enumerated, including Mr. Daoud's case, in which terrorist plots had been stopped.*" (*Id.*) (emphasis added).

6. Rather, Senate Legal Counsel adds, "the nine cases the Chairman summarized were drawn from a list of 100 arrests arising out of foiled terrorism plots in the United States between 2009 and 2012 compiled by committee staff *from FBI press releases and other public sources.*" (Ex. B, p. 2). Senate Legal Counsel identifies the list compiled by the Committee staff was entitled, "Terrorist Arrests and Plots Stopped in the United States 2009-2012," and indicates that a slightly earlier version of this document is available on the SSCI's website. (*Id.*, pp. 2-3,

[1] The filing of this motion for discovery, as counsel for the SSCI suggests, is done out of courtesy and respect for the SSCI, and should not be construed as a concession or agreement with its counsel's legislative privilege analysis, and undersigned counsel would expressly reserve the right to challenge the SSCI's position, if necessary. Indeed, and notwithstanding the SSCI's disclaimer regarding the preservation of Senator Feinstein or the Committee's privileges, counsel's gratuitous attempts at explaining or clarifying the Chairman's remarks in question, could very well be construed as a waiver of the privilege should it later become necessary to litigate a subpoena for documents and/or testimony.

footnote 1) (emphasis in original). Senate Legal Counsel further notes that, in contrast to this public source information, "any information that the Committee may have received about use of FAA authorities would be classified and would have been provided to the Committee by the Executive Branch, from which it can be sought directly." (*Id*., p. 3, footnote 3).

7. Remarkably, Senate Legal Counsel then goes on to make further representations on Senator Feinstein's behalf in an ostensible attempt to summarize. Only a complete quote will do justice to the purported summary or explanation:

> To summarize, nothing in Senator Feinstein's remarks was intended to convey any view that FAA authorities were used or were not used in Mr. Daoud's case or in any of the other cases specifically named. *Rather, her purpose in reviewing several recent terrorism arrests was to refute the "view by some that this country no longer needs to fear attack." Id*. Thus, because Senator Feinstein was neither relying on, nor attempting to convey, any information about the use or non-use of FAA authorities in any of the nine cases, there are no "assessments, reports, and other information" in the Committee's possession to which Senator Feinstein referred in her comments, pertaining to FAA surveillance with respect to Mr. Daoud's case. *Id*.[2] (emphasis added).

8. Senate Legal Counsel concludes the letter by asserting that the SSCI is "not prepared to initiate a general search of its oversight files to ascertain whether or not any documents exist in its files that may shed light on the type of surveillance authorized in Mr. Daoud's case." (*Id*., p. 4). Instead, Senate Legal Counsel suggests that Mr. Daoud should seek production from the Executive Branch. This too is worth quoting in full: "Any such evidence that may be within the possession of the Committee would derive entirely from information

[2] This representation is rather remarkable on several levels. First, it is hard to believe that Chairman Feinstein, one of the most experienced and respected Senators in Congress, would advocate for the reauthorization of the FAA without actually "relying on" or "attempting to convey" information about the use or non-use of the FAA itself which was then under consideration. Equally remarkable, if Mr. Frankel is correct on this point, is that the mere use of nine random "ripped from the headlines" (or more precisely, "ripped from FBI press releases") terrorism arrests to justify the reauthorization of a statute that Edward Snowden's disclosures have revealed to the world as massive, overreaching, and often abused surveillance programs is a poignant illustration of the use politics of fear.

supplied by the Executive Branch, from which Mr. Daoud can directly seek production to the extent provided by federal law and the rules of criminal procedure." (Ex. B, p. 4).

9. Counsel for Mr. Daoud, therefore, do just that. Rather than engage the Court at this time in the complex legislative privilege issues raised by Senate Legal Counsel, undersigned counsel would formally request that the prosecutors seek authorization from whomever they must to obtain approval from the Executive Branch and its intelligence agencies to produce the materials that Senate Legal Counsel states are in its possession. Counsel defer to the Court to fashion a means by which the prosecutors can produce these materials should some or all of the materials be classified. In that undersigned counsel all possess security clearances, this should not be a significant hurdle in light of the constitutional issues involved.

10. As counsel have previously noted, these materials "are essential to a full and fair exposition and resolution of the significant statutory and constitutional issues of first impression presented by this motion." (Dkt. #65, ¶ 4). (Motion to Vacate The Denial of His Motion for Notice of FISA Amendments Act (FAA) Evidence Pursuant to 50 U.S.C. §§1881e(a), 1806(c); and For Leave to File a Response to the Government's Sur-Reply to Defendant's Motion for Notice of FAA Evidence). As such, it is likewise submitted that these documents are discoverable under Rule 16(a)(1)(E)(i) & (ii), as well as *Brady*, *supra*.[3]

11. At the risk of stating the obvious, had the FAA not been used whatsoever in the investigation of Defendant, one would think that the Office of Senate Legal Counsel, the SSCI, Senator Feinstein, the NSA, the FBI, the Justice Department, or the U.S. Attorney's Office could just simply say so. That "clarification" would have been far more helpful than any provided by Senate Legal Counsel or the opaque responses by the prosecutors to date. Again, undersigned

[3] In addition to providing a basis for suppression of the fruits of the poisonous tree, the existence of FAA surveillance and its fruits most certainly could lead to the discovery of potentially exculpatory material.

counsel would suggest that the semantic and procedural battle being waged here only further demonstrates the lengths by which the Executive Branch, or more correctly its intelligence agencies, wish to avoid constitutional review of the FAA.

Respectfully submitted,

/s/Thomas Anthony Durkin
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/s/Janis D. Roberts
JANIS D. ROBERTS,

/s/Joshua G. Herman
JOSHUA G. HERMAN,
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CERTIFICATE OF SERVICE

Thomas Anthony Durkin, Attorney at Law, hereby certifies that the foregoing Motion for Discovery in Support of Defendant's Previously Filed Motion for Notice of FISA Amendments Act Evidence Pursuant to 50 U.S.C. §§ 1881e(a), 1806(c) (Dkt. #42), was served on September 18, 2013, in accordance with Fed.R.Crim.P.49, Fed.R.Civ.P.5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

/s/ Thomas Anthony Durkin
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Attorney at Law.

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EXHIBIT A

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August 20, 2013

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Re: ***United States v. Daoud;***
No. 12 CR 723

Dear Counsel:

We represent Adel Daoud, the defendant in the above-captioned federal criminal case that is pending in the United States District Court for the Northern District of Illinois, before the Honorable Sharon Johnson Coleman, United States District Court Judge. A trial in this matter has been scheduled to begin on February 3, 2014. The parties are currently in the midst of litigating pretrial motions, including disclosure and suppression motions concerning the Foreign Intelligence Surveillance Act ("FISA") and the FISA Amendments Act of 2008 ("FAA").

Our pleadings regarding the use of the FAA in this case are based in large part on comments made by Senator Dianne Feinstein, Chairman of the United States Senate Select Committee ("the Committee") on December 27, 2012, in support of "A bill (H.R. 5949) to extend the FISA Amendments Act of 2008 for five years." 158 Cong. Rec.168, S8384 (2012). In her statements, the Chairman listed a thwarted plot to bomb a downtown Chicago bar as evidence of the FAA's success. *Id.* at S8393. There is no doubt that this reference to a plot to bomb a downtown Chicago bar refers to Mr. Daoud's case. We have enclosed a copy of the pertinent pages of the Congressional Record for your convenience.

Based on Senator Feinstein's comments, we believe the Committee has information material both to the preparation of Mr. Daoud's defense and the pending motions. Thus, we respectfully request that your office produce any and all "assessments, reports, and other information obtained by the Intelligence Committee" to which Senator Feinstein referred in sharing her comments with the Senate, insofar as these documents pertain to the implementation of the FAA surveillance with respect to Mr. Daoud's case. *Id.* at p. S8393. We make this

request for voluntary compliance prior to requesting subpoena power relief with the Court pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure.

So that we may take the appropriate steps without unnecessary delay, we would appreciate it if, by August 30, 2013, your office could advise us if it will comply with this request for voluntary compliance. We do not need production of the materials by that date, but we would like to know by then whether we will need to apply for a subpoena.

Respectfully yours,

Thomas Anthony Durkin

TAD/ech
Enclosure

cc: The Honorable Dianne Feinstein
AUSA William Ridgway
AUSA Barry Jonas

[Congressional Record Volume 158, Number 168 (Thursday, December 27, 2012)]
[Senate]
[Pages S8384-S8410]

FISA AMENDMENTS ACT REAUTHORIZATION ACT OF 2012

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to consideration of H.R. 5949, which the clerk will report.

The legislative clerk read as follows:

A bill (H.R. 5949) to extend the FISA Amendments Act of 2008 for five years.

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Oregon, Mr. Wyden, is recognized.

Mr. WYDEN. Mr. President, I thank Leader Reid for the honor of being able to open this morning's debate. I also wish to particularly identify with a point the leader made. There is an old saying that most of life is just showing up. I think what the American people want--I heard that at checkout lines in our local stores, for example, this week--they want everybody back in Washington and going to work on this issue, just as the leader suggested.

I think Senators know I am a charter member of what I guess you could call the optimist caucus in the Senate. As improbable as some of these talking heads say on TV that it is, I still think we ought to be here, just as the leader said, working on this issue because of the consequences.

Mr. REID. Mr. President, will my friend yield for a question?

Mr. WYDEN. I would be happy to yield to the majority leader.

Mr. REID. The distinguished Senator from Oregon and I served together in the House of Representatives. Does the Senator remember the days when the House voted not as a majority but as a body to come up with how legislation should be given to the American people? Does my friend remember that?

Mr. WYDEN. I do. The leader is being logical, and Heaven forbid that sometimes logic break out on some of these matters. I remember when we started out--and I joked that I had a full head of hair and rugged good looks--the majority leader and I used to work with people on both sides of the aisle. We would try to show up early, go home late, and, as the leader said, focus on getting some results. I thank the leader for his point and again for the honor of being able to start this discussion.

As I indicated, what I hear at home is that we are supposed to be here and try to find some common ground. I know the talking heads on TV say this is impossible and it cannot be done. First of all, as the majority leader said, this has been done in the past. When there are big issues and big challenges, historically the Congress will come together and deal with it.

I am particularly concerned about some of the effects going over the cliff will have on vulnerable senior citizens. As the Presiding Officer knows, that is my background. We have often talked about health care and seniors. My background was serving as codirector of the Oregon Gray Panthers. I [illegible] the reimbursement system for Medicare, I

[[Page S8385]]

effect goes over this cliff, that is going to reduce access to health care for senior citizens across the country, and I don't believe there are Democrats and Republicans who want that to happen.

As the majority leader indicated, finding some common ground on this issue and backing our country away from the fiscal cliff is hugely important and crucial to the well-being of our country. I just want

the Section 702 semiannual assessment and the Title VII semiannual report and encompasses all the provisions of the Act. In addition to requirements that pertain to Titles I-V of FISA, the report must include a ``summary of significant legal interpretations'' involving matters before the FISA Court and copies of all decisions, orders, or opinions of the FISA Court that include ``significant construction or interpretation'' of any provision of FISA, including Section 702. Section 601(a) [50 U.S.C. 1871(a)].

Provision of Documents Relating to Significant Construction or Interpretation of FISA. Within 45 days of any decision, order, or opinion issued by the FISA Court that ``includes significant construction or interpretation of any provision of [FISA]'' (including Section 702), the AG is required to submit to the congressional intelligence and judiciary committees ``a copy of the decision, order, or opinion'' and any ``pleadings, applications, or memoranda of law associated with such decision, order, or opinion.'' Section 601(c) [50 U.S.C. 1871(c)].

Mrs. FEINSTEIN. So, Mr. President, it is not a question of this oversight not being done. I must respectfully disagree with the Senator from Oregon on that point. There is clearly rigorous oversight, and we have done hearing after hearing, we have looked at report after report, and any Member of this body who so wishes can go and review this material in the offices of the Intelligence Committee.

Now, let me talk about a protection that does exist for privacy, but will expire if this bill is not passed. That is section 704. Under this section, the intelligence community is required to get a specific judicial order before conducting surveillance on a U.S. person located outside the United States.

Before this provision was enacted in 2008 as the product of Senators who were concerned--and they were listened to, and this was enacted--the intelligence community could conduct intelligence collection on U.S. persons outside the country with only the approval of the Attorney General but without a requirement of independent judicial review. Section 704 provides that judicial review by the special Foreign Intelligence Surveillance Court. This will only be preserved if title VII of this act is reauthorized. If it isn't, the privacy provision goes down with it.

Now, let me talk a bit more about the oversight that we have done. If you listen to some, there has been little oversight, but that is not the case. We have held numerous hearings with Directors of National Intelligence Dennis Blair and Jim Clapper; with the head of the NSA, General Alexander; and with Bob Mueller at the FBI. We have had Eric Holder appear before the committee to discuss this, and we have heard from intelligence community professionals involved in carrying out surveillance operations, the lawyers who review these operations, and, importantly, the inspectors general who carry out oversight of the program and have written reports and letters to the Congress with the results of that report.

The intelligence committee's review of these FAA surveillance authorities has included the receipt and examination of dozens of reports concerning the implementation of these authorities over the past 4 years, which the executive branch is required to provide by law. We have received and scrutinized all the classified opinions of the court that interpret the law in a significant way.

Finally, our staff has held countless briefings with officials from the NSA, the DOJ, the Office of the DNI, and the FISA Court itself, including the FBI. Collectively, these assessments, reports, and other information obtained by the Intelligence Committee demonstrate that the government implements the FAA surveillance authorities in a responsible manner, with relatively few incidents of noncompliance.

Let me say this. Where such incidents of noncompliance have arisen, they have been inadvertent. They have not been intentional. They have been the result of human error or technical defect, and they have been promptly reported and remedied. That is important. Through 4 years of oversight, from all these reports, from all the meetings, from all the hearings, we have not identified a single case in which a government

official engaged in a willful effort to circumvent or violate the law.

Keep in mind the oversight performed by Congress--that is, both Houses--and the FISA court comes in addition to the extensive internal oversight of the implementation that is performed by the Department of Justice, the Director of National Intelligence, and multiple IGs.

There is a view by some that this country no longer needs to fear attack. I don't share that view, and I have asked the intelligence committee staff to compile arrests that have been made in the last 4 years in America on terrorist plots that have been stopped. There are 100 arrests that have been made between 2009 and 2012. There have been 16 individuals arrested just this year alone. Let me quickly review some of these plots. Some of these may arrests come about as a result of this program. Again, if Members want to see the specific cases where FISA Amendments Act authorities were used, they can go and look at the classified background of these cases.

First, in November, 1 month ago, two arrests for conspiracy to provide material support to terrorists and use a weapon of mass destruction. That was Raees Alam Qazi and Sheheryar Alam Qazi. They were arrested by the FBI in Fort Lauderdale, FL. The next case is another conspiracy to provide material support. Arrested were Ralph Deleon, Miguel Alejandro Santana Vidriales and Arifeen David Gojali. These three men were planning to travel to Afghanistan to attend terrorist training and commit violent jihad; third, was a plot to bomb the New York Federal Reserve Bank; fourth, a plot to bomb a downtown Chicago bar; fifth, a conspiracy to provide material support to the Islamic Jihad Union; sixth, a plot to carry out a suicide bomb attack against the U.S. Capitol in February of 2012; seventh, a plot to bomb locations in Tampa, FL; eighth, a plot to bomb New York City targets and troops returning from combat overseas; ninth, a plot to assassinate the Saudi Ambassador to the United States; and it goes on and on and on.

So I believe the FISA Amendments Act is important and these cases show the program has worked. As the years go on, I believe good intelligence is the most important way to prevent these attacks.

Information gained through programs such as this one--and through other sources as well--is able to be used to prevent future attacks. So, in the past 4 years, there have been 100 arrests to prevent something from happening in the United States, some of these plots have been thwarted because of this program. I think it is a vital program. We are doing our level best to conduct good oversight and keep abreast of the details of the program and to see that these reports come in. I have tried to satisfy Senator Wyden but apparently have been unable to do so.

I am hopeful the Senate Intelligence Committee's 13-to-2 vote to reauthorize this important legislation will be considered by all Members.

I ask unanimous consent to have printed in the Record the Statement of Administrative Policy on the House bill.

There being no objection, the material was ordered to be printed in the Record, as follows:

Statement of Administration Policy

H.R. 5949--FISA Amendments Act Reauthorization Act of 2012

(Rep. Smith, R-TX, and 5 cosponsors, Sept. 10, 2012)

The Administration strongly supports H.R. 5949. The bill would reauthorize Title VII of the Foreign Intelligence Surveillance Act (FISA), which expires at the end of this year. Title VII of FISA allows the Intelligence Community to collect vital foreign intelligence information about international terrorists and other important targets overseas, while providing protection for the civil liberties and privacy of Americans. Intelligence collection under Title VII has produced and continues to produce significant information that is vital to defend the Nation against international terrorism and other threats. The Administration

EXHIBIT B

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United States Senate

OFFICE OF SENATE LEGAL COUNSEL
WASHINGTON, DC 20510–7250

September 16, 2013

Thomas Anthony Durkin, Esq.
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2446 North Clark Street
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Re: *United States v. Daoud*, No. 12 CR 723 (N.D. Ill.)

Dear Mr. Durkin:

I am writing on behalf of the United States Senate Select Committee on Intelligence ("the Intelligence Committee" or "the Committee") to respond to your August 20, 2013 letter to Committee counsel requesting that the Committee produce "any and all 'assessments, reports, and other information obtained by the Intelligence Committee' to which Senator Feinstein referred in sharing her comments with the Senate, insofar as these documents pertain to the implementation of the FAA surveillance with respect to Mr. Daoud's case."

The Committee is charged with the critical responsibility "to oversee and make continuing studies of the intelligence activities and programs of the United States Government" and "to provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States." S. Res. 400, 94th Cong., 2d Sess. § 1 (1976) (as amended). Among its duties is the responsibility "to make every effort to assure that the appropriate departments and agencies of the United States provide informed and timely intelligence necessary for the executive and legislative branches to make sound decisions affecting the security and vital interests of the Nation." *Id.*

To enable the provision of timely and accurate intelligence information to the Congress, the Senate has imposed strict procedural and substantive restrictions on the Intelligence Committee's handling of classified and sensitive national security intelligence information. *See id.* §§ 4, 6-8. In execution of its mandate, it is the Committee's policy not to make available outside the Senate or Executive Branch records of its oversight and investigative activities except, when consistent with the national interest, through the Committee's public hearings and unclassified reports.

In furtherance of the robust and unfettered performance of the Intelligence Committee's constitutional legislative and oversight responsibilities, the Speech or Debate Clause, Article I, section 6, clause 1, of the United States Constitution provides the Committee with an absolute privilege from the compelled production of documents or testimony. That Clause provides congressional committees absolute immunity from subpoenas or other requests for documents or testimony, *see Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Gravel v.*

United States, 408 U.S. 606 (1972); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995); *Minpeco, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856 (D.C. Cir. 1988), regarding all matters that "fall within the 'sphere of legitimate legislative activity.'" *Eastland*, 421 U.S. at 501. The Clause's immunity equally applies to protect Members of Congress from subpoenas from defendants in criminal cases. *See United States v. Ehrlichman*, 389 F. Supp. 95 (D.D.C. 1974), *aff'd on other grounds*, *United States v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976); *United States v. Moussaoui*, Cr. No. 01-455 (E.D. Va. March 2, 2006) (applying Speech or Debate Clause to quash subpoena issued by criminal defendant to Member of Congress seeking testimony and documents concerning "key issue" in capital case).

Your request seeks records at the core of the legislative and oversight activities of the Intelligence Committee. Accordingly, the Speech or Debate Clause provides the Committee with an absolute privilege from any attempt to compel production of any such records. Indeed, the request seeks records supporting statements made by the Committee's Chairman while engaging in "Speech or Debate" on pending legislation on the Senate floor, thus directly attempting to "question" a Member about legislative activity that lies at the very heart of the Speech or Debate Clause.

As your letter explains, your "pleadings regarding the use of the FAA in this case are based in large part on comments made by Senator Dianne Feinstein" on December 27, 2012. Citing and enclosing an excerpt from the Congressional Record for that date, your letter indicates, "In her statements, the Chairman listed a thwarted plot to bomb a downtown Chicago bar as evidence of the FAA's success. [158 Cong. Rec.] at S8393." Accordingly, you seek production of "all 'assessments, reports, and other information obtained by the Intelligence Committee' to which Senator Feinstein referred in sharing her comments with the Senate, insofar as these documents pertain to the implementation of the FAA surveillance with respect to Mr. Daoud's case. *Id.* at p. S8393."

Without waiving Senator Feinstein's or the Intelligence Committee's legislative privileges, I would like to provide some clarification that may help explain a misunderstanding of the Chairman's remarks on which your documentary request is predicated. Notwithstanding that she was speaking in support of reauthorization of Title VII of the Foreign Intelligence Surveillance Act, Senator Feinstein did not state, and did not mean to state, that FAA surveillance was used in any or all of the nine cases she enumerated, including Mr. Daoud's case, in which terrorist plots had been stopped. Rather, the nine cases the Chairman summarized were drawn from a list of 100 arrests arising out of foiled terrorism plots in the United States between 2009 and 2012 compiled by committee staff *from FBI press releases and other public sources*.[1]

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[1] The list compiled by the Committee staff was titled "Terrorist Arrests and Plots Stopped in the United States 2009-2012." A slightly earlier version of this document is available on the Intelligence Committee Chairman's public website at

(continued...)

The Chairman explained that "in the past 4 years, *there have been 100 arrests* to prevent something from happening in the United States, *some of these plots* have been thwarted because of this [FAA surveillance] program." 158 Cong. Rec. S8393 (emphasis added). Prefacing her "quick review" of nine plots, Senator Feinstein admonished that, while "some of these . . . arrests [may have] come about as a result of this program[,][2] . . . *if Members want to see the specific cases where FISA Amendment Act authorities were used*, they can go and look at the classified background of these cases," *id.* (emphasis added), as, again, the cases the Chairman itemized were drawn from a summary compiled from public sources of arrests in foiled plots over a four-year period.[3] Indeed, the enumerated cases were simply the nine most recent cases on the overall list of 100 arrests (excepting one case the Chairman skipped over). As the Chairman noted after ticking off the nine recent plots, the list of foiled attacks she could have cited "goes on and on and on." *Id.*

To summarize, nothing in Senator Feinstein's remarks was intended to convey any view that FAA authorities were used or were not used in Mr. Daoud's case or in any of the other cases specifically named. Rather, her purpose in reviewing several recent terrorism arrests was to refute the "view by some that this country no longer needs to fear attack." *Id.* Thus, because Senator Feinstein was neither relying on, nor attempting to convey, any information about the use or non-use of FAA authorities in any of the nine cases, there are no "assessments, reports, and other information" in the Committee's possession to which Senator Feinstein referred in her comments, pertaining to FAA surveillance with respect to Mr. Daoud's case. *Id.*[4]

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[1](...continued)
http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=adec6e10-68ed-4413-8934-3623edc62cef. The document states at the outset that it was "Compiled by Senate Intelligence Committee staff based on publicly available information from the FBI, the Congressional Research Service, and media reports".

[2] Through an editing error, this statement is transcribed in the Congressional Record as, "Some of these may arrests come about as a result of this program." *Id.*

[3] In contrast to the public source information about terrorism arrests, any information that the Committee may have received about use of FAA authorities would be classified and would have been provided to the Committee by the Executive Branch, from which it can be sought directly.

[4] The Chairman's reference to "assessments, reports, and other information obtained by the Intelligence Committee" did not refer to information about specific uses of FAA authorities, but to statutorily required oversight reports addressed to issues of compliance or noncompliance with the law. *See* 158 Cong. Rec. S8393. The information she cited about arrests was compiled from public sources, not from statutory compliance reports submitted to the Committee.

For the reasons described above, the Committee is not prepared to initiate a general records search of its oversight files to ascertain whether or not any documents exist in its files that may shed light on the type of surveillance authorized in Mr. Daoud's case. Any such evidence that may be within the possession of the Committee would derive entirely from information supplied by the Executive Branch, from which Mr. Daoud can directly seek production to the extent provided by federal law and the rules of criminal procedure.

I hope that this information is helpful to you.

Sincerely,

Morgan J. Frankel

Morgan J. Frankel

cc: The Honorable Dianne Feinstein
The Honorable Saxby Chambliss
William E. Ridgway, Esq., AUSA
Barry Jonas, Esq., AUSA